Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976
NO. _____

76-812

WILLIAM EDWARD HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH E. CONKLIN
Conklin & Noble
5530 Wisconsin Avenue
Chevy Chase, Maryland 20015

Counsel for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, WILLIAM EDWARD HARRIS, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 15, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 15, 1976 affirming the Judgment of the United States District Court for the Western District of Washington at Seattle. This Petition for Certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C.§ 1254 (1).

QUESTIONS PRESENTED

1. Whether the indictment set out all the required elements of the offense for which Defendant was charged and sufficiently informed him of the necessary facts so as to enable him to adequately prepare his defense.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18§ 912. Officer or Employee of the United States:

Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

United States Code, Title 18§ 913. Impersonator Making Arrest or Search:

Whoever falsely represents himself to be an officer, agent, or employee of the United States, and in such assumed character arrests or detains any person or in any manner searches the person, buildings, or other property of any person, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION:

AMENDMENT VI--JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On February 5,6, and 7, 1975, the Petitioner, William E. Harris and a Co-defendant, Peter Shewchuk were tried in the United States District Court for the Western District of Washington at Seattle on a two count indictment charging that they aided and abetted a third party who demanded and obtained money by pretending to be an I.R.S. Agent (Title 18, U.S. Code Sections 912 and 2) and that they aided and abetted a third party in detaining and searching the person of another (Title 18, U.S. Code Sections 912 and 2). The indictment charged as follows:

COUNT I

On or about February 15, 1974, at Seattle, within the Western District of Washington, EARNEST CLARENCE FRANKS aided and abetted by WILLIAM EDWARD HARRIS and PETER SHEWCHUK willfully and with the intent to defraud did falsely assume and pretend to be an officer and employee acting under the authority of the United States, that is, an agent of the Internal Revenue Service, and in such pretended character, did demand and obtain money. All in violation of Title 18, United States Code, Sections 912 and 2.

COUNT II.

On or about February 15, 1975, at Seattle, within the Western District of Washington, EARNEST CLARENCE FRANKS aided and abetted by WILLIAM EDWARD HARRIS and PETER SHEWCHUK did wilfully, falsely represent himself to be an officer and employee of the United States, that is an agent of the Internal Revenue Service, and in such assumed character did detain and search the person of another person. All in violation of Title 18, United States Code, Sections 912 and 2.

In each of the counts of the indictment returned by the grand jury they failed to specify the exact location of the alleged offense, they failed to name a victim or victims, or to set out how the false representation took place, and in Count I of the indictment the grand jury not only failed to name a victim they failed to allege that there was in fact a victim, and in Count II failed to allege that the detention and search was without the consent of the victim. Further, Count II of the indictment was improperly codified to charge an offense under Section 912 that should properly have been charged under Section 913. Additionally, in Count I, the grand jury neglected to inform the defendant as

to the amount of money that was allegedly obtained.

Trial by Jury commenced on February 5, 1975. At the conclusion of the trial Petitioner was found guilty of both charges. The Co-defendant was found not guilty. On March 6, 1975 Petitioner was sentenced to a term of imprisonment of three years on each count with count two running concurrent with the sentence on count one.

Petitioner appealed his conviction to the United States Court of Appeals for the Ninth Circuit arguing that the indictment did not set out all the required elements of the offense for which the Defendant was charged and did not properly inform him of all the necessary facts to enable him to prepare his defense.

On November 15, 1976 the Court of Appeals entered Judgment affirming Petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW DEPARTS FROM THE ACCEPTED AND USUAL STANDARDS OF THE SUFFICIENCY OF AN INDICTMENT

Peititioner contends that the indictment is fatally defective in that it failed to set out even the most basic facts required by Rule 7(c)

Federal Rules of Criminal Practice which provided:

> "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such a statement. Allegations made in one count may be incorporated in another count.
> It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction

if the error or omission did not mislead the defandant to his prejudice."

The cases are legion in which the courts have emphasized the basic protections which an indictment is intended to guarantee. The criteria by which the sufficiency of an indictment is to be measured was re-examined and affirmed in Russell vs. United States, 82 S.Ct. 1038 (1962) wherein the court held that the indictment must

"contain the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to met,' "

and, secondly

"in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. Cochran and Sayre vs. United States 157 U.S. 286, 290, 15 S.Ct. 628, 630, 39 L.Ed. 704; Rosen vs. United States, 161 U.S. 29, 34, 16 S.Ct. 434, 480, 40 L.Ed. 606." Hagner vs. United States, 285 U.S. 427, 431, 52 S.Ct. 417, 419,

76 L.Ed. 861. See Potter vs. United States, 155 U.S. 438, 445, 15 S.Ct. 144, 146, 39 L.Ed 214; Bartell vs. United States, 227 U.S. 427, 431, 33 S.Ct. 383, 384, 57 L.Ed. 583; Berger vs. United States, 295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1314; United States vs. Debrow, 346 U.S. 374, 377-378, 74 S.Ct. 113, 115-116, 98 L.Ed. 92.

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words themselves fully, directly and expressly, without any uncertainty, set forth all the elements necessary to constitute the offense intented to be punished, ***." Russell vs. United States, supra United States vs. Carll, 105 U.S. 611 26 L.Ed. 1135.

"Undoubetly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general

description, with which he is charged." Russell vs. United States supra United States vs. Hess, 124, U.S. 483, 487, 8 S.Ct. 571, 573, 31 L.Ed. 516. See also Pettibone vs. United States, 148 U.S. 197, 202-204, 13 S.Ct. 542, 545, 37 L.Ed. 419; Blitz vs. United States, 153, U.S. 308, 315, 14 S.Ct. 924, 927, 38 L.Ed. 725; Keck vs. United States, 172 U.S. 434, 437, 19 S.Ct. 254, 255, 43 L.Ed. 505; Morisetta vs. United States, 342 U.S. 246, 270, n. 30, 72 S.Ct. 240, 253, 96 L.Ed. 288. Cf. United States vs. Petrillo, 332, U.S. 1, 10-11, 67 S.Ct. 1538, 1543, 91 L.Ed., 1877.

These basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure. Russell vs. United States, 82 S.Ct. 1038 (1962). A vital function of an indictment is to provide,

> "such description of the particular act alleged to have been committed by the accused as will enable him properly to defend against the accusation ***"

4 Wharton's Criminal Law and Procedure, Section 1760 at 553 (R. Anderson Ed. 1957); accord Russell vs. United States, 369 U.S. 749, 764, 82 S.Ct. 1038, L.Ed. 2d. 240 (1962); Hagner vs. United States, 285 U.S. 427, 431, 52 S.Ct. 417, 76 L.Ed. 861 (1932); Wong Tai vs. United States, 273 U.S. 77, 80-81, 47 S.Ct. 300, 71 L.Ed. 545 (1927); Burton vs. United States, 202 U.S. 344, 372, 26 S.Ct., 688, 50 L.Ed. 1057 (1906); United States vs. Simmons, 96 U.S. 360, 362, 24 L.Ed. 812 (1878); United States vs. Cruikshank, 92 U.S. 542, 557-558, 23 L.Ed. 588 (1875); Flying Eagle Publications, Inc. vs. United States 273 F. 2d. 799, 802 (1st Cir. 1960); cf. Dario Sanchez vs. United States, 341 F. 2d. 379, 380 (1st Cir.), cert. denied, 381 U.S. 940, 85 S.Ct. 1775, 14 L.Ed. 2d. 704 (1965).

The refusal of the Ninth Circuit to require that an indictment set out all of the required elements of the offense and to properly inform him of the necessary facts to enable him to propare a defense cannot be justified.

II.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE SUFFICIENCY OF AN INDICTMENT UNDER THE SIXTH AMENDMENT.

In reaching its decision the Ninth Circuit failed to consider that a combination of deletions from the indictment, though the absence of each one it itself not being critical, would make the indictment fatally defective.

The First Circuit considered the principle derived from the Sixth Amendment's guarantee of the right of the accused "to be informed of the nature and cause of the accusation***" in United States vs. Tomasetta. C.A. Mass. 1970, 429, F. 2d. 978 affirming that without sufficient information to identify the conduct which the grand jury has deemed adequate to support an indictment, an accused is at a material disadvantage in meeting the charge against him.

In the Tomasetta case defendant appealed his conviction for violation of the loan sharking provision of 18 U.S.C. 894 (Supp. V. 1970) and contended that the indictment was defenctive because it failed to name the alleged victim, to locate the offense with specificity, to describe in sufficient detail the extortionate means charged, and to allege federal jurisdiction.

In reversing the conviction and remanding to dismiss the indictment the Court in the Tomasetta Case held:

> "In applying these criteria to the case at bar we think it essential to bear two things in mind. First, what is a fair description of a crime for purposes of permitting an adequate defense necessarily varies with the nature of the offense and the peculiarities of defending against the kind of charge involved. People ex rel. Guido vs. Calkins, 9 N.Y. 2d. 77, 211 N.Y.S. 2d. 166, 172, N.E. 2d. 549 (1961). Second, arbitrary rules as to the necessity, in the abstract of a given averment have no place in the analysis, as the question is whether the indictment as a whole conveys sufficient information to properly identify the conduct relied upon by the grand jury in preferring the charge.
>
> " With the foregoing in mind, we have concluded that the indictment is deficient. The defendant is accused of making threats by an unstated means

to an unnamed person on a particular day in a city of moderate size. He is presumed to be innocent of the charge. Consider, then, the course a defense in such a case might take given adequate information.

" A Defendant might seem to show that at the time in question he was not at the scene of the crime, in short, to establish an alibi. But unless the defendant can demonstrate that he was not in the city of Worcester during the entire day in question this is impossible, as the precise time and place are not specified.

" Another course open in a case such as this would be to demonstrate that the conduct which allegedly amounted to the communication of threats never took place, that a communication did take place but conveyed no threat or that the meaning of an ambiguous communication has been misconstrued by the grand jury. This would ordinarily be done by seeking the writing at issue or witnesses to the conversation or incident in question. Moreover, as the crime is essentially a speaking

offense it would be critical for a defendant to fix in his mind the substance of any conversation in issue as soon as possible. However, where the location, time and object of the communication are specified only in the most general terms or not at all, we cannot see how this manner of defense could be undertaken. In sum, this defendant could not possibly have made an adequate preparation for trial on the basis of the information contained in this indictment.

" A different approach to the problem yields the same result. The federal system views the grand jury as an important element of the criminal process. It, and it alone, is competent to charge an accused with a crime of this nature, as it is most vividly illustrated by the rule barring substantive amendments to indictments without resubmission to the grand jury and the fact that a defective indictment is not cured by a bill of particulars. Russell vs. United States, supra n. 2, 369 U.S. at 770-771, 82 S.Ct. 1038.

On an indictment as vague as that at bar, it is possible, however, unlikely, for a prosecutor to obtain a conviction based wholly on evidence of an incident completely divorced from that upon which the grand jury based its indictment. The prosecution may not have the power to 'roam at large' in this fashion. Russell vs. United States, supra, n. 2, at 768-771, 82 S.Ct. 1038; United States vs. Agone, 302 F. Supp. 1258, 1261 (S.D.N.Y. 1969)

* * *

" In reaching this conclusion we stress that no one factor is determinitive. The failure to specify the means by which the alleged threats were communicated need not, of itself, be fatal. United States vs. Agone, supra, n.3 at 1259-1260. The failure to specify with greater precision the location of the alleged offense would surely not have given rise to this result were sufficient additional facts averred. See United States vs. Bujese, 371 F. 2d. 120, 124 (3rd Cir. 1967); Flores vs. United States, 338 F. 2d. 966,

967, (10th Cir. 1964) 1 C. Wright Federal Practice and Procedure Criminal Sec. 125, at 245 (1969); 4 Wharton's supra n. 2 Sec. 1777. And even the failure to name the victim, as serious a handicap to the defense as that on occasion may be, might not alone have led to this result. These factors, however, when taken together, make it unfair to require the defendant to answer this charge. (Emphasis added). United States vs. Tomasetta, 429 F. 2d. 978 (1970)."

The statute, 18 U.S.C.A. Sec. 912, defines two offenses, the first offense being that of falsely assuming or pretending to be an officer or employee acting under the authority of the United States or any department agency or officer thereof and acting as such, and the second is that of falsely assuming or pretending such character, and in such pretended character demanding or obtaining any money. Shepherd vs. United States, 191 F. 2d. 682, 683; Elliott vs. Hudspeth, 110 F. 2d. 389, 390.

Using this standard in reviewing the indictment it would appear that the grand jury was attempting to charge the defendant under the

second offense of the statute, that with intent to defraud and in such pretended character did obtain something of value from another person. (Emphasis added). However, one can only assume this since the indictment not only failed to name the victim, it failed to allege that there was a victim.

In the United States vs. Randolph 460 F. 2d. 367 (1972) the Fifth Circuit Court of Appeals reversed the conviction of the defendant for falsely impersonating an officer of the United States Army on the grounds that the intent to defraud or deceive another person was a necessary element that had to be alleged in the indictment when the allegation of intent to defraud or deceive is required. (Emphasis added).

In the instant case the failure of the indictment to (a) specify the exact time and location of the alleged offense or to set out how the false representations took place (b) to even allege that there was a victim (Count I), or (c) name that victim (Count I and II) and the failure of the indictment to (d) allege that the detention and search was without consent of the victim (Count II), and to (e) charge Appellant under the wrong section of the statute (Count II), and to (f) fail to inform the defendant as to the amount of money he was

alleged to have obtained, clearly failed to inform the defendant of the nature and cause of the accusations against him as provided by the Sixth Amendment to the United States Constitution and recognized by the First and Fifth Circuits.

CONCLUSION

The application of the above described tests to the case at bar demonstrate with convincing clarity how the indictment failed to set out the elements of the offense for which defendant was charged and inform him of the necessary facts of the alleged offense. For these reasons it is apparent that the indictment was fatally defective and there exists a conflict between the Circuits and a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,
KENNETH E. CONKLIN

Conklin & Noble
Suite 1630
5530 Wisconsin Avenue
Chevy Chase, Maryland
20015
301-652-1298

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appelee, V. WILLIAM EDWARD HARRIS, Defendant-Appellant.	No. 75-1621 MEMORANDUM

Appeal from the United States District Court
for the Western District of Washington

Before: WRIGHT and CHOY, Circuit Judges,
and WHELAN, * District Judge

On this appeal Appellant contends that his conviction should be reversed on the ground that the indictment upon which he stands convicted was defective and upon the further ground that the trial court erred in failing to give particular instructions which had been requested

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*Honorable Francis C. Whelan, United States District Judge, Central District of California, sitting by designation.

by Appellant.

With respect to the first ground, Appellant contends that neither count of the two-count indictment sets out all of the required elements of the offense charged respectively therein against him and that the indictment did not properly inform him of all the facts necessary to enable him to prepare his defense.

In short, he contends that the exact location of the alleged offense should have been set forth in each count of the indictment and that the indictment in each count should have named a victim or victims; he further contends that the indictment was defective in Count 1 thereof for the reason that there was no allegation that there was in fact a victim of the charge against Defendant and that in Count 2 there was a failure to allege that the detention and search referred to in such Count was without the consent of the victim. Count 1 charged a violation of Title 18, U.S.C. Sections 912 and 2, while Count 2 charged a definite violation of Sections 913 and 2 of Title 18, U.S.C. although Count 2 stated the offense charged was in violation of Section 912. Appellant therefore contends that Count 2 is defective in such respect.

Count 1 charged that one Clarence Franks, aided and abetted by Appellant and Peter Shewchuk, wilfully and with intent to defraud did falsely assume and pretend to be an officer and employee acting under the authority of the United States, to wit, an agent of the Internal Revenue Service, and in such pretended character did demand and obtain money.

Count 2 charged that the same Franks, aided and abetted by Appellant and Peter Shewchuk, did willfully and falsely represent himself to be an agent of the Internal Revenue Service and in such assumed character did obtain and search the person of another person.

Appellant did not attack the indictment in the trial court. He thus has a heavy burden to sustain his late claim of insufficiency. Kaneshiro v. United States, 445 F. 2d. 1266 (9th Cir. 1971). In any event the indictment is legally sufficient both as to Counts 1 and 2 thereof. It is not necessary to set forth the precise location and time of the alleged criminal act in an indictment; all that is required with respect to place is that the indictment show that the offense was committed within the jurisdiction of the court. Lowry v. United States, 161 F. 2d. 30 (8th Cir. 1947);

Burk v. United States, 179 F. 2d. 305 (4th Cir. 1950). Nor need the indictment herein name a victim. United States v. Panzavecchia, 446 F. 2d. 1293 (5th Cir. 1971); Young v. United States, 288 F. 2d. 398 (D.C. Cir. 1961). Appellant's reliance on United States v. Tomasetta, 429 F. 2d. 978 (1st Cir. 1970) is misplaced. There the First Circuit made clear that its holding was based on a combination of factors which made the indictment defective and that, most importantly, a fair description of a crime in an indictment varies with the nature of the offense.

Here, Count 1 of the indictment was drafted in the language of the statute which fact negates the soundness of Appellant's contention that the indictment is defective. Brown v. United States, 222 F. 2d. 293, 296 (9th Cir. 1955). Nothing said in Russell v. United States, 369 U.S. 749 (1962) militates against our reasoning. United States v. Lepowich, 318 U.S. 702 (1942) supports it; there the Supreme Court in construing the predecessor statute of Section 912 stated at page 704: "If the statutory language alone had been used, the indictment would have been proof against demurrer under Lamar v. United States, 241 U.S. 103, 116;

Pierce v. United States, 314 U.S. 306, 307." The Supreme Court then held that the indictment in Lepowich (which did not name a victim) was legally sufficient; the court stated the indictment in question "has merely been made more elaborate than that in the Lamar case by the addition of a description of the nature of the alleged fraud." 318 U.S. at 704.

In the instant case as in Lepowich Count 1 charged an impersonation with intent to defraud.

Nor is Appellant's contention that Count 2 is defective for the reason that it does not allege that the detention and search charged therein was without the consent of the victim sound. The statute (section 913 of Title 18 U.S.C.) by its terms does not require that the detention or search be without the consent of the victim.

The contention of Appellant that Count 2 of the indictment is defective for the reason that it cites Section 912 of Title 18 U.S.C. as the statute involved in the charge, is without merit for the reason that the indictment set forth a sufficient charge of violation of Section 913 of Title 18. Thus there could be no prejudice to the Appellant. It is the text of the indictment that controls. See United States v. Hutchison, 312 U.S. 219, 229 (1941). Nor is

the fact that Count 1 did not specify the amount of money demanded and obtained grounds for reversal; it is not required that the precise amount be set forth in the indictment. See Heaton v. United States, 353 F. 2d. 288 (9th Cir. 1965).

The instruction which the Defendant says should have been given by the trial court but was not would have required that the jury find beyond a reasonable doubt that the money referred to in Count 1 was demanded and obtained upon the strength of a false pretension that Franks was an agent of the Internal Revenue Service and as to Count 2 it would have been a requirement that the jury find beyond a reasonable doubt that the detention and search alleged was done upon the strength of such a false representation. As stated in United States v. Barnow, 239 U.S. 74, 78 (1915), "It is a false pretense of federal authority that is the mischief to be cured". Thus, it was not in error for the trail court in this case to refuse to give the instruction requested by Appellant. United States v. Hessbrook, 504 F. 2d. 1375, 1376-1377 (5th Cir. 1974).

There being no merit in any of Appellant's contentions, Appellant's conviction on both counts is affirmed.

***